

This Opinion is Not a
Precedent of the TTAB

Mailed: April 1, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re ProBody Scandinavia

Serial No. 87771075

Thomas D. Foster of TDFoster - Intellectual Property Law,
for ProBody Scandinavia.

Patrick Carr, Trademark Examining Attorney, Law Office 125,
Heather Biddulph, Managing Attorney.

Before Kuczma, Lykos and Larkin,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

ProBody Scandinavia (“Applicant”) has filed an application to register the mark

FASHIONSUPPORT in standard characters on the Principal Register for:

Compression bandages; Compression garments;
Compression socks for medical or therapeutic use; Body
limb compression sleeves for use in soccer and other sports;
Chemically activated hot and/or cold compresses;
Compression garments, namely, compression socks,
stockings; Contrast compression therapy units for reducing
pain, swelling and inflammation; Elastic stockings for
medical purposes; Elastic stockings for surgical purposes;
Elastic stockings for surgical use; Electrotherapy devices
for providing transcutaneous electrical nerve stimulation,
infrared heat and compression; Fitted sleeve for filled

compressed gas cylinder used for medical purposes to identify the contents of the cylinder; Medical apparatus, namely, non- or low-compression devices for holding thermal packs to the breasts; Medical compression stockings and tights; Non-medicated compresses; Post-pregnancy abdominal support and compression undergarments, girdles and underwear for medical purposes; Surgical compresses; Therapeutic compression wraps; Therapeutic apparatus, namely, body limb thermal compression undergarments for relief of muscular and joint pain through targeted thermal application and compression; Therapeutic apparatus, namely, chemically activated anti-cellulite wraps, ice packs, compresses, and compression bandages; Therapeutic hot and cold compression wraps; Thermo-electric compresses in International Class 10.¹

The Trademark Examining Attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is merely descriptive of Applicant's identified goods.

When the refusal was made final, Applicant appealed and filed a request for reconsideration, which was denied. Applicant and the Examining Attorney have filed briefs. For the reasons set forth below, we affirm the refusal to register.

¹ Application Serial No. 87771075, filed January 25, 2018, under Sections 1(b) and 44(e) of the Trademark Act, alleging a bona fide intent to use the mark in commerce, and based on European (EU) Office for Harmonization in the Internal Market (OHIM) now known as the European Union Intellectual Property Office (EUIPO). Registration No. 015139141 issued August 4, 2006. During prosecution, Applicant amended its mark from FASHION SUPPORT to FASHIONSUPPORT. *See* April 23, 2020 Response to Office Action.

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVue docket system.

In the absence of acquired distinctiveness,² Section 2(e)(1) of the Trademark Act prohibits registration of a mark on the Principal Register that, when used in connection with an applicant's goods, is merely descriptive of them. 15 U.S.C. § 1052(e)(1). "A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). *See also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). By contrast, a mark is suggestive if it "requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods." *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Suggestive marks, unlike merely descriptive terms, are registrable on the Principal Register without proof of secondary meaning. *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004).

The determination of whether a mark is merely descriptive must be made in relation to the goods for which registration is sought, not in the abstract. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831. This requires consideration of the context in which the mark is used or intended to be used in connection with those goods, and the possible significance that the mark would have to the average purchaser of the goods in the marketplace. *In re Chamber of*

² Applicant does not argue that if its proposed mark is found to be merely descriptive, it is nevertheless registrable because it has acquired distinctiveness.

Commerce, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831; *In re Omaha Nat’l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987). In other words, the question is not whether someone presented only with the mark could guess the goods listed in the identification. Rather, the question is whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries, newspapers, or surveys,” *In re Bayer*, 82 USPQ2d at 1831, as well as “labels, packages, or in advertising material directed to the goods.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). It may also be obtained from websites and publications, and, in the case of a use-based application, an applicant’s own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1565 (Fed. Cir. 2001). In this particular case, the involved application has been filed under Trademark Act Sections 1(b) and 44(e). Nonetheless, the Examining Attorney is not precluded from relying on excerpts from Applicant’s own marketing materials as evidence of public perception of the mark. *See In re Promo Ink*, 78 USPQ2d 1301, 1303 (TTAB 2006) (examining attorney may introduce evidence that applicant’s own literature supports descriptiveness of term despite the fact that application based on

intent-to-use; fact that applicant has filed an intent-to-use application does not limit the examining attorney's evidentiary options or shield an applicant from producing evidence that it may have in its possession).

We focus our analysis on the following goods in International Class 10: "Compression garments; Compression socks for medical or therapeutic use; Body limb compression sleeves for use in soccer and other sports; Compression garments, namely, compression socks, stockings; ... Elastic stockings for medical purposes; ... Post-pregnancy abdominal support and compression undergarments, girdles and underwear for medical purposes." This is because a descriptiveness refusal must be affirmed if the proposed mark is merely descriptive of any of the numerous goods identified in the application. *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005) (quoting *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46, 48 (CCPA 1975) ("Our predecessor court ... has stated that 'registration should be refused if the mark is descriptive of any of the goods for which registration is sought.'")).

In support of the refusal, the Examining Attorney made of record the dictionary definition of "fashion" from the American English version of COLLINS ENGLISH DICTIONARY (www.collins.com) as "the current style or mode of dress, speech, conduct, etc." and "something, esp. a garment, in the current style."³ According to MERRIAM-

³ January 28, 2021 Office Action, p. 38. We have not considered the definitions of "fashion" from the British English version of COLLINS DICTIONARY. See January 28, 2021 Office Action, pp. 39-40. Nor have we considered the definition of "fashion" from the online version of the LEXICO-OXFORD DICTIONARY which is a dictionary of British English. See October 23, 2019 Office Action.

WEBSTER DICTIONARY (www.merriam-webster.com), the word “support” is defined as “to hold up or serve as a foundation or prop for.”⁴

The record demonstrates that competitors in the medical compression and support garment field use the term “fashion” or synonyms or variants thereof to highlight their products’ desirable and stylish attributes while simultaneously supporting the body as part of a person’s medical treatment or condition. We note the following examples:

Lymphedema Products offers “medical-grade compression wear,” that “embrace your condition, and sport colorful, fanciful items, such as the LymphEDIVAs line of elegant, fun, expressive compression wear ...provide an excellent opportunity to personalize your style...” and “allow you to dress **fashionably**.”⁵

Medi offers compression wear that “[f]it every lifestyle need with color and pattern choices. ... [C]ompression stockings have evolved to be indistinguishable from traditional hosiery to reflect different lifestyles and patient preferences. From a variety of patterns, design elements, transparency levels, and color motifs, modern compression stockings now complement any wardrobe to reflect individual style.” Medi touts its “mediven flat-knit family of products contain an array of vibrant color choices, sophisticated design and **fashion** elements” so that wearers can maintain their “sense of style.”⁶

⁴ We grant the Examining Attorney’s request made in her appeal brief at 17 TTABVUE 11 to take judicial notice of the dictionary definition of “support” from the online version of MERRIAM-WEBSTER DICTIONARY, previously referenced in the May 14, 2018 Office Action. *See In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1747 n.15 (TTAB 2018) (taking judicial notice of definition from Dictionary.com because it was from The Random House Unabridged Dictionary), *aff’d per curiam*, 777 F. App’x 516 (Fed. Cir. 2019); *In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1768 (TTAB 2016) (taking judicial notice of definitions from Merriam-Webster Online Dictionary at www.merriam-webster.com).

⁵ January 28, 2021 Office Action, pp. 6-8 (emphasis added).

⁶ *Id.* at 33-39 (emphasis added).

An article from Flux explains the evolution of compression garments designs, with manufacturers “constantly coming out with new, striking designs that catch the eye of the average user...[t]here’s certainly a culture of **fashion** within the fitness community...”⁷

Cathe explains that “[a] far cry from the brightly-colored compression clothing you see today, compression garments from the past were mostly plain-colored stockings worn by people with varicose veins and other veins problems. ... More than just a **fashion** statement, compression garment makers claim compression sportswear is not only stylish but has fitness benefits.”⁸

GymHugz blog shows that fitness enthusiasts “enjoy wearing compression clothing as **fashion** gym wear.”⁹

Similarly, the record demonstrates that the word “support” or variants thereof are commonly used by competitors to describe a function of the goods identified in Applicant’s application. “Compression garments are special clothing containing elastomeric fibers and yarns used to apply substantial mechanical pressure on the surface of needed body zones for stabilizing, compressing, and **supporting** underlying tissues.”¹⁰ Such garments “are used in the medical field to relieve the symptoms of circulatory health issues and reduce swelling.”¹¹ Competitors in the

⁷ August 26, 2021 Reconsideration Denial, pp. 77-82 (emphasis added).

⁸ *Id.* at 81 (emphasis added).

⁹ *Id.* at 93-97 (emphasis added).

¹⁰ “Compression Garments for Medical Therapy and Sports” January 18, 2021 Office Action, p. 49-50 (emphasis added).

¹¹ GymHugz blog, August 26, 2021 Denial of Request for Reconsideration, p. 91 (emphasis added). This appears to be a blog hosted by a nationally sponsored source. Blogs hosted by individuals by contrast are more limited insofar as we do not know the extent of their reach to the public. Nonetheless, it is undisputed that the blogs are publicly available. *See, e.g., In re Morrison & Foerster LLP*, 110 USPQ2d 1423, 1424 n.2 (TTAB 2014) (“These blog postings are from what appear to be well-established media sources with national circulation and public exposure as well as more obscure blogs for which we cannot ascertain the degree of

industry use the term “support” in this manner when advertising their goods. For example:

Brightlife Direct explains that compression wraps and bandages are used to provide “additional **support** and protection” and serve to “improve[] structural **support**” and even uses support as a noun to refer to some of its goods generically, noting that “[t]his adjustable **support** looks like a sport brace...”.¹²

Apparelsearch.com advertises “[c]ompression clothes and accessories [that] provide **support**...”¹³

Science Direct offers “[c]ompression garments [that] are used to provide **support** to people who stand for longer periods or people with poor circulation.”¹⁴

Medi advertises compression garments that “have the versatility to add special features for therapeutic **support**...”¹⁵

Leonisa advertises that its “post-surgical compression garments are the perfect solution...Post-surgery compression garments provide necessary **support** to the areas of the body that are weakened after a medical procedure.”¹⁶

VeryWellfit offers compression garments that are “woven tightly to **support** and restrict your body’s tissues.”¹⁷

exposure. As such, we are aware that many of the blogs may simply reflect the perception of a single author and not that of the general public.”).

¹² January 15, 2019 Office Action, pp. 35-36(emphasis added).

¹³ *Id.* at 12(emphasis added).

¹⁴ *Id.* at 14(emphasis added).

¹⁵ *Id.* at 36 (emphasis added).

¹⁶ *Id.* at 84 (emphasis added).

¹⁷ *Id.* at 98 (emphasis added).

Taken together, this evidence shows that Applicant's mark FASHIONSUPPORT, when considered as a whole, immediately conveys a feature and purpose of the identified goods, namely that Applicant's wraps and compression garments are designed to be stylish and appealing while performing the vital function of supporting the body as part of the treatment of certain medical conditions. Marks that convey a function or purpose of the goods are merely descriptive. *See, e.g., In re Hunter Fan Co.*, 78 USPQ2d 1474 (TTAB 2006) (ERGONOMIC held merely descriptive of ceiling fans). The fact that Applicant's proposed mark is presented as a compound word mark (i.e., a mark comprised of two or more distinct words represented as one word) does not alter its significance as merely descriptive since the combination of the terms does not "evoke a new and unique commercial impression." TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 1209.03(d) (July 2021). *See, e.g., In re Finisar Corp.*, 78 USPQ2d 1618 (TTAB 2006), *aff'd per curiam*, 223 Fed. App'x 984 (Fed. Cir. 2007) (SMARTSFP held merely descriptive of optical transceivers).

Applicant counters that its proposed mark FASHIONSUPPORT is suggestive in relation to the identified goods because the juxtaposition of the two words requires the consumer to engage in multistep reasoning since "some degree of thought or imagination is required to understand that Applicant's goods involve 'compression bandages or compression socks.'" ¹⁸ Applicant argues that contrary to the Examining Attorney's position,

Applicant's goods are not made in a popular or recent style
for clothing ... While having a supportive function to the

¹⁸ Applicant's Appeal Brief, p. 7; 15 TTABVUE 8.

body, Applicant's goods are constructed for medical use and there is no popular or recent style aspect to them. They are merely made in neutral colors that blend in with the user's skin tone.¹⁹

Applicant's marketing materials touting the visually appealing attributes of its products in various styles show otherwise. By way of illustration, we note the following advertisement for Applicant's FashionSupport "Fashionable Comfort Stockings," in various colors and styles, including "lace-garter:"²⁰

FashionSupport 10mmHg/40 Denier

Available in the following Styles:

- **AD Knee-High** in closed toe
- **AGH Thigh-High** with lace-garter, closed toe
- **AT Pantyhose**, closed toe
- **Materials:** Soft Polyamide with Lycra/Elastane, 40 Denier
- **Sizes:** S, M, L, XL and XXL
- **Colors:** Black, light-beige (Nude) and dark-beige (Sahara)

A-D AGH women A-T

Easy Step[®]
FashionSupport[®] 10 mmHg
Fashionable Comfort Stockings
Modische Komfort-Stützstrümpfe
Fashionable komfortstrümpfer

ProBody Medical Aps

¹⁹ See *id.*

²⁰ January 7, 2021 Response, p. 48.

Because the advertisement uses Applicant's proposed mark FASHIONSUPPORT for Applicant's support stockings together with the word "Fashionable," we have no doubt that prospective consumers would have no difficulty understanding the meaning of Applicant's mark. *Cf. N.C. Lottery*, 123 USPQ2d at 1710 (affirming finding that the applicant's mark FIRST TUESDAY was merely descriptive of lottery games where the "explanatory text accompanying the mark FIRST TUESDAY" in the applicant's specimen was "not complicated" and "simply use[d] the same two words as the mark—'first Tuesday'—along with words like 'new' and 'every month' to describe the relevant feature or characteristic of N.C. Lottery's scratch-off lottery games."). To reiterate, the question of whether FASHIONSUPPORT is merely descriptive is not determined by asking whether one can guess, from the mark itself, what the goods are, but rather by asking, when FASHIONSUPPORT is seen on or in connection with the goods, whether it immediately conveys information about their nature. *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003); *In re Tower Tech*, 64 USPQ2d at 1316-17; *In re Patent & Trademark Serv. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998). No imagination or thought is required by prospective consumers to discern the nature of Applicant's goods. To the contrary, to purchasers encountering Applicant's goods, Applicant's proposed mark immediately conveys, without conjecture or speculation, an attribute and function of Applicant's goods, namely, that they provide support while being fashionable.

Applicant points to sixteen (16) third-party registered marks comprised of the term FASHION as further evidence that its mark FASHIONSUPPORT is not merely

descriptive.²¹ Fourteen (14) of those registrations have been cancelled.²² A cancelled or expired registration is “only evidence that the registration issued and does not afford [an applicant] any legal presumptions under Trademark Act Section 7(b),” including the presumption that the registration is valid, owned by the registrant, and the registrant has the exclusive right to use the mark in commerce in connection with the goods specified in the registration certificate. *Bond v. Taylor*, 119 USPQ2d 1049, 1054-55 (TTAB 2016) (citing *In re Pedersen*, 109 USPQ2d 1185, 1197 (TTAB 2013)); see also *Anderson, Clayton & Co. v. Krier*, 478 F.2d 1246, 178 USPQ 46, 47 (CCPA 1973) (statutory benefits of registration disappear when the registration is cancelled). With regard to the remaining two registrations, it is well settled that eligibility for registration must be determined on a case-by-case basis and on the facts and evidence of record that exist at the time a particular registration is sought. See *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 213 USPQ 9 (CCPA 1982); *In re Thunderbird Prods. Corp.*, 406 F.2d 1389, 160 USPQ 730 (CCPA 1969). By way of illustration, in *In re Scholastic Testing Serv., Inc.*, 196 USPQ 517, 519 (TTAB 1977), the Board found the term SCHOLASTIC merely descriptive of devising, scoring, and validating tests for others despite the presence of other marks on the Register using the word “Scholastic.” The same principle holds true here.

Applicant also urges the Board to take into account the declaration of its principal, Henning Schoesler. Mr. Schoesler states in relevant part that he has been

²¹ See July 27, 2021 Request for Reconsideration, pp. 13-31.

²² See *id.*

selling the identified goods “for well over 15 years;” that he is “very knowledgeable of these types of products and competitors that sell these types of products;” and that “he knows of no competitors that use the term FASHION SUPPORT to describe these types of products.”²³ The declaration does not convince us that Applicant’s mark is not merely descriptive. As aptly put by the Examining Attorney:

Applicant’s denial of knowledge of competitors that use the wording FASHION SUPPORT in connection with the applied-for goods quite simply has very little, if any, relevance to the question of whether the wording is descriptive of a feature or characteristic of the goods.²⁴

And even assuming that Mr. Schoesler is correct that Applicant is the first or only user of the term FASHION SUPPORT, this does not alter our finding. The fact that an applicant may be the first or only user of a merely descriptive designation does not necessarily render a word or term incongruous or distinctive. *See In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016); *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012). *See also In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987) (“To allow trademark protection for generic terms, i.e., names which describe the genus of goods being sold, even when these have become identified with a first user, would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are.”).

²³ Schoesler Declaration, ¶¶ 2-3; January 7, 2021 Response, pp. 8-9.

²⁴ Examining Attorney’s Brief, 15 TTABVUE 16.

In sum, upon consideration of the entirety of the record and arguments, including those not specifically discussed in our opinion, we find Applicant's proposed standard character mark FASHIONSUPPORT to be merely descriptive of at least one of the identified goods in within the meaning of Section 2(e)(1) of the Trademark Act, and therefore ineligible for registration on the Principal Register in the absence of a showing of acquired distinctiveness.

Decision: The refusal to register is affirmed.